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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

OWENS-CORNING FIBERGLAS CORPORATION,
Petitioner,

v.

PATRICK J. BRENNAN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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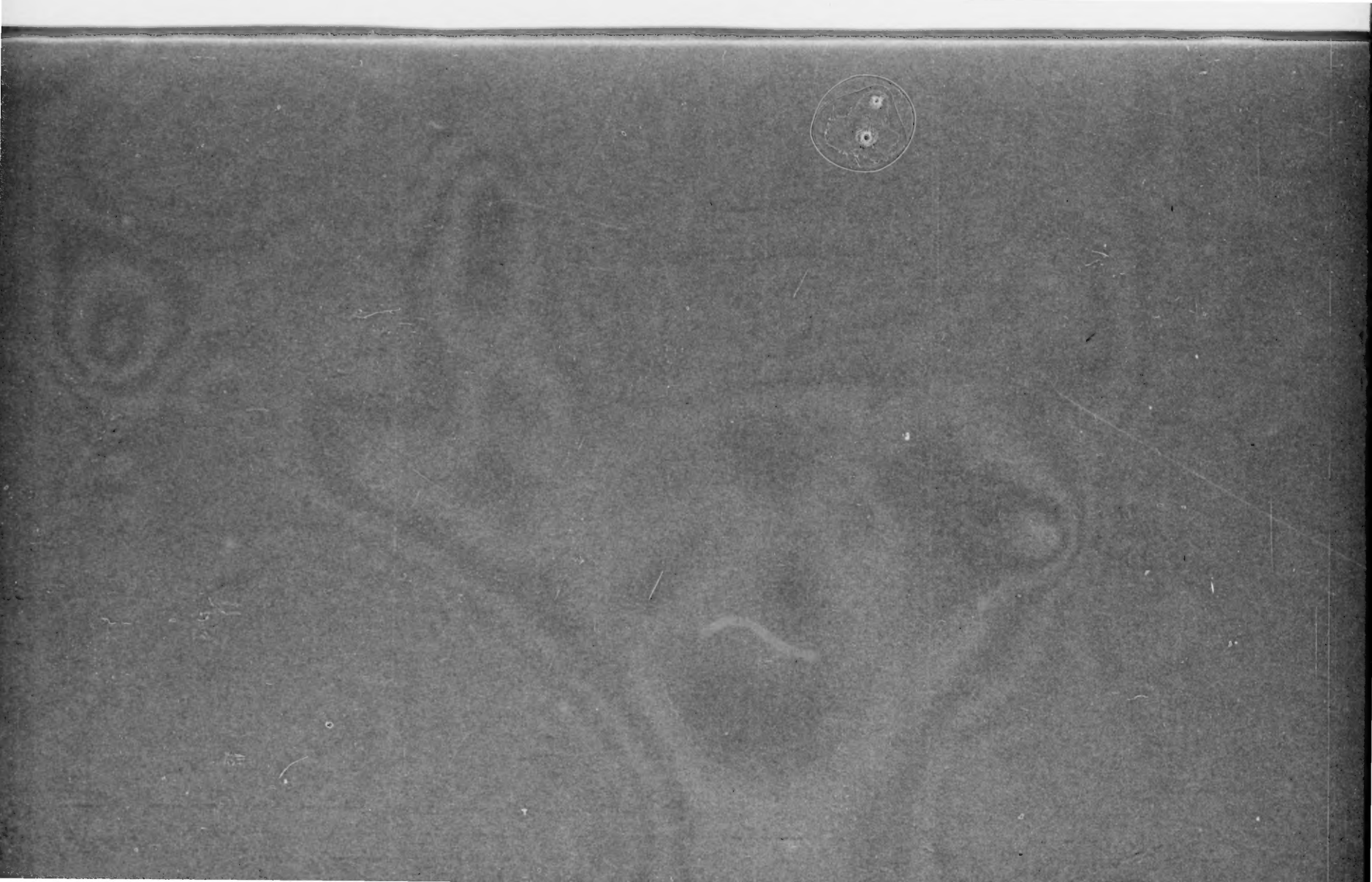

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REPLY BRIEF FOR THE PETITIONER

Owens-Corning Fiberglas Corporation ("OCF") respectfully submits this reply brief in support of its petition for a writ of certiorari.

I. Summary Reversal Is Necessary To Correct The Trial Court's Clear Refusal To Review The Size Of The Punitive Damage Award

In response to OCF's showing that the trial court did not review the size of the punitive damage award, respondent asserts (Br. in Opp. 11) that OCF waived this issue by failing to request a transcript of the oral argument of its post-trial motions. Respondent's argument is meritless, because the trial court did not rule on OCF's challenge to the punitive damage award at the time of the oral argument. Instead, the court "took under advisement the punitive damage issue in [OCF's] Motion for a New Trial." Pet. App. 30a. Thereafter, the court issued the opinion set forth in the petition appendix, stating: "The Court, after hearing and considering the arguments presented, *now* renders its decision and denies the Motion for New Trial, or in the alternative, for remittitur as to the issue of punitive damages." *Id.* at 30a-31a (emphasis added). Thus, the transcript of the oral argument would have been and is irrelevant because the trial court's complete ruling is set forth in its written opinion, not in the transcript.[1]

[1]Respondent's assertion (Br. in Opp. 10) that trial courts need not set forth in writing their reasons for upholding awards of punitive damages is wholly beside the point. The constitutional violation at issue here is the court of appeals' refusal to remedy the trial court's utter failure to conduct any judicial review of the size of the punitive damage award.

Respondent is wholly unable to refute OCF's showing (Pet. 7-10) that the trial court failed to conduct the requisite review of the size of the punitive damage award. Indeed, respondent's attempts to support his claim that the trial court made an "implied" determination of this issue serve merely to bolster OCF's position.

For example, respondent asserts that the trial court must be deemed to have conducted the requisite judicial review because it "knew its posttrial role was to make sure the award was '*reasonable* in amount and *rational* in view of its purpose . . . .'" Br. in Opp. 11 (quoting Pet. App. 34a). The words used by the trial court immediately prior to the passage quoted by respondent reveal, however, that the trial court's concern for reasonableness and rationality applied only to its jury instructions. What the trial court actually stated is this: "[T]he main concern of the court *in presenting its instructions* is to ensure that the punitive award is *reasonable* in amount and *rational* in view of its purpose . . . ." Pet. App. 34a (first emphasis added).

Obviously, that passage provides no support for respondent's assertion that the trial court conducted its own review of the size of the punitive damage award. To the contrary, that passage merely confirms what is obvious from the remainder of the trial court's opinion: the court limited itself to a review of the trial procedures and jury instructions because it believed that its constitutional obligations were satisfied and OCF's constitutional rights vindicated once it had assured itself that the jury's discretion had been subjected to appropriate constraints by the punitive damage instructions.

Respondent also errs in claiming that the trial court found no due process violation because it "concluded that . . . the jury exercised reasonable *restraint* in imposing punitive damages." Br. in Opp. 11 (citing Pet. App. 38a-39a) (emphasis added). What the trial court held instead is that

"due process [wa]s satisfied" because "the jury's discretion was exercised within reasonable *constraints*." Pet. App. 39a (emphasis added). OCF's argument is straightforward: Regardless of the alleged adequacy of the procedural "constraints" imposed on the jury, the Due Process Clause also requires judicial review of the *size* of the punitive damage award itself. The trial court's opinion makes perfectly clear that it did not conduct any such review because it operated under the misapprehension that "due process is satisfied" by adequate trial procedures alone. The court of appeals failed to correct that misapprehension, in direct contravention of this Court's decision in *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331, 2341 (1994), and summary reversal is therefore appropriate.

II. Review Is Warranted To Resolve The Conflict Among The Lower Courts Regarding Whether The Due Process Clause Requires Appellate Courts To Review The Size Of Punitive Damage Awards

Respondent makes no effort to show that the court of appeals conducted any appellate review of the size of the punitive damage award. Instead, respondent appears to argue (Br. in Opp. 14-16 & n.10) that the court of appeals' failure to comply with the dictates of the Due Process Clause and *Honda* should be excused because the Appellate Division allegedly conducted the requisite review. That argument is wholly without merit.

In the first place, as previously explained (Pet. 8 n.2, 12), the Appellate Division did not properly review the size of the punitive damage award to determine whether it was unconstitutionally excessive. Respondent quotes (Br. in Opp. 14) that court's off-hand remark that the punitive damage award "'does not jar one's constitutional sensibilities,'" but that remark was immediately followed by the explanation that the punitive damage award "*presumably* reflect[ed] the jury's and the trial court's assessment" of

various factors. Pet. App. 28a (emphasis added). Appellate review does not consist of adopting a conclusive presumption that the jury and trial court imposed an appropriate award, particularly where, as here, the trial court conducted no judicial review of the size of that award.

In any event, the nature of the review undertaken by the Appellate Division is irrelevant. OCF properly exercised its statutory right of appeal to the Ninth Circuit, and that court reviews appeals from the Guam courts without giving any deference to the intervening decisions of the Appellate Division. *See Guam v. Yang*, 850 F.2d 507, 511 (9th Cir. 1988) (en banc). Thus, the court of appeals had an independent obligation to conduct its own review of the size of the punitive damage award in this case.

Respondent effectively concedes that the court of appeals did not satisfy that obligation, admitting (Br. in Opp. 16 n.10) that "neither reviewing court decided any issue of federal law." In short, OCF challenged the unconstitutionally excessive nature of the punitive damage award at all levels of the judicial system (Pet. 4-6), but the court of appeals refused to conduct any appellate review of the size of that award. Review is warranted to resolve the conflict between that approach and the numerous contrary decisions cited in the petition. Pet. 11-12.

III. The Punitive Damage Award Is Grossly Excessive Under The Due Process Clause And The Factors Presented In The *BMW* Case

A. Respondent contends (Br. in Opp. 17-21) that OCF has waived its challenge to the excessiveness of the punitive damage award because it did not present the jury with evidence of prior punitive damage awards against it. That contention is without merit, for several reasons.

First, respondent misconstrues the question presented in the petition. OCF seeks review of the question whether the

punitive damage award is unconstitutionally excessive, and there is no dispute that OCF preserved that issue at all stages of this litigation. Respondent's waiver argument is, therefore, mistaken.[2]

Second, respondent errs in assuming that OCF's due process claim cannot be considered unless evidence of prior punitive damage awards was presented to the jury in a particular case. No such evidence was presented to the jury in the *BMW* case; indeed, no such evidence could have been presented, because no prior punitive damage awards had been imposed on the petitioner in that case. The factor relied upon by the petitioner in *BMW* is instead the obvious potential for multiple awards in the mass tort context (*see, e.g.*, *BMW* Pet. Br. 45-50); precisely that same factor is present in this case, as even respondent concedes (Br. in Opp. 24).[3]

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[2]It is difficult to understand the point of respondent's discussion (Br. in Opp. 18-19) of this Court's Rule 14.1(g)(i) and the adequate-and-independent state ground doctrine. Those rules have no application to this petition, which seeks review of the judgment of a federal court of appeals. To be sure, the trial court in this case was a Guam territorial court (not a state court), but this Court's jurisdiction to review the judgment below rests upon 28 U.S.C. § 1254(1), not 28 U.S.C. § 1257(a), and federal review of judgments entered in the Guam courts is plenary even as to matters of Guam law, *see Guam v. Yang*, 850 F.2d at 511.

[3]Respondent's insistence on the need for presentation of such evidence to the jury appears to rest on the assumption that courts considering claims of excessiveness are precluded from considering matters not presented to the jury. The question of excessiveness is one of law for the court, however, not a factual issue for determination by the jury. For that reason, both the California courts and the Ninth Circuit look to awards in other cases in considering whether a particular award is excessive, without regard to whether those other awards were presented to the jury at trial.

[Footnote continued on next page]

In any event, evidence of the mass-tort nature of this case and the clear potential for massive damages awards *was* properly presented to the lower courts. In support of its motion for new trial or remittitur, for example, OCF submitted to the trial court excerpts from its 1991 Form 10-K showing *inter alia* that it had taken an $800 million charge against future earnings in that year alone to reflect the estimated *uninsured* cost of future awards in asbestos cases. *See* CR 2181 (C.A. Excerpt of Record tab F). Respondent filed a motion to strike that material from the record, but the trial court denied that motion. *See* CR 2187, reproduced at App., *infra*, 1a-2a.

OCF presented similar evidence to the court of appeals, explaining the massive and increasing financial impact of asbestos litigation and identifying all punitive damages awards previously imposed on OCF in asbestos cases. *See* OCF C.A. Br. 25-27 n.27 (citing 38 other cases in which more than $73 million in punitive damage awards had been

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[Footnote continued from previous page]

See, e.g., Morgan v. Woessner, 997 F.2d 1244, 1257 (9th Cir. 1993), *cert. dismissed*, 114 S. Ct. 671 (1994); *Yako v. United States*, 891 F.2d 738, 746 (9th Cir. 1989); *Trevino v. United States*, 804 F.2d 1512, 1515 (9th Cir. 1986), *cert. denied*, 484 U.S. 816 (1987); *Shaw v. United States*, 741 F.2d 1202, 1209 (9th Cir. 1984); *Las Palmas Assocs. v. Las Palmas Ctr. Assocs.*, 235 Cal. App. 3d 1220, 1259 n.9, 1 Cal. Rptr. 2d 301 (1991); *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.*, 155 Cal. App. 3d 381, 393-96, 202 Cal. Rptr. 204 (1984); *see also Magallanes v. Superior Court*, 167 Cal. App. 3d 878, 888, 213 Cal. Rptr. 547 (1985) (barring punitive damages in part based on counsel's statement "at oral argument that there are hundreds of [similar] cases pending nationwide").

imposed on OCF);[4] *id.* at 24-25 (noting that as of March 31, 1995, OCF had already settled or resolved approximately 107,800 asbestos claims and had taken an aggregate charge against earnings of $943 million to reflect the estimated uninsured costs of asbestos litigation through 1999) (citing OCF's First Quarter 1993 Form 10-Q, C.A. Excerpt of Record tab H).[5]

Respondent filed a motion to strike all references to this material from OCF's brief, asserting that it was not properly before the court of appeals. OCF filed a response to that motion, explaining that this material was the proper subject of judicial notice and was therefore appropriate for consideration by the court. *See* Response of Appellant in Opposition to Motion to Strike Portions of Appellant's Brief and Excerpt of Record and Request for Sanctions at 6-11 (citing *inter alia* Fed. R. Evid. 201; *United States ex rel. Robinson Rancheria v. Borneo, Inc.*, 971 F.2d 244,

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[4]Respondent is simply wrong in asserting (Br. in Opp. 22 n.13) that this total included amounts (such as the $25 million awarded by the jury in *Dunn v. HOVIC*, 1 F.3d 1371 (3d Cir.), *cert. denied*, 114 S. Ct. 650 (1993)) that had been reduced on appeal at the time OCF's brief was filed in the court of appeals. To the contrary, the total set forth in OCF's brief did not include any remitted or reversed portions of the punitive damage awards at issue. Since the time that brief was filed, of course, a few of these awards have been remitted or reversed, but many additional awards have been imposed on OCF; the current total is in excess of $100 million.

[5]OCF presented similar material to the Appellate Division, but as respondent notes (Br. in Opp. 20), that court granted respondent's motion to strike that information from OCF's briefs in that court. What respondent neglects to point out, however, is that OCF presented this same material to the court of appeals, and that court did *not* grant respondent's motion to strike.

248 (9th Cir. 1992); *Kramer v. Time Warner Inc.*, 937 F.2d 767, 774 (2d Cir. 1991); *In re Kelly*, 841 F.2d 908, 911 n.1 (9th Cir. 1988); *Railway Labor Execs. Ass'n v. ICC*, 784 F.2d 959, 968 (9th Cir. 1986)).

The court of appeals did not grant respondent's motion to strike. Thus, OCF's showing of past punitive awards and the financial impact of asbestos litigation was properly before that court when it made its decision, and those matters are part of the record in this case. Respondent's waiver argument is therefore incorrect even on its own terms.

B. Respondent also errs in attempting to deny the existence of evidence demonstrating OCF's compliance with government and industry safety standards. As OCF explained below, it "presented evidence that various tests conducted in the 1960's by Aetna, DuPont, and Union Carbide uniformly concluded that Kaylo could be manufactured, cut, and used safely without exceeding the Threshold Limit Value [TLV],"[6] which had been "recommended by the American Conference of Governmental Industrial Hygienists and adopted by various jurisdictions, including New Jersey (where OCF manufactured Kaylo) and Ohio (where OCF's headquarters were located)." OCF C.A. Br. 31 (citing OCF Exhs. 55, 73, 84, 136, 280, 407, 620, 621, 625; C.A. Excerpt of Record 172-84C); *see also* II Tr. 951-52, 956-57, 1058-59, 1068-69.[7]

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[6]Respondent claims (Br. in Opp. 4-5 & n.3, 17) that OCF did not conduct any of its own tests, but ignores the fact that tests conducted by outsiders showed that Kaylo could be manufactured and handled without creating average asbestos exposures in excess of the TLV. Respondent points to a study conducted by Aetna in 1958 (*see* Br. in Opp. 4-5 n.3, citing Brennan Ex. 33), but even that study (which was conducted for Owens-Illinois) showed that Kaylo dust levels were below the TLV in most work areas.

[7]Respondent asserts (Br. in Opp. 3-4 & n.3) that the ACGIH is not

[Footnote continued on next page]

Moreover, OCF began placing warning labels on Kaylo boxes in 1966, long before labeling was required by federal law. OCF C.A. Reply Br. 14 n.25 (citing II Tr. 542-43, 552-53; OCF Exhs. 416, 421). When OSHA promulgated a regulation in 1972 requiring the labeling of asbestos products, the label already being used by OCF complied fully with the regulation. OCF C.A. Br. 31 (citing OCF Exh. 270, 279).

As the foregoing discussion demonstrates, OCF introduced substantial evidence of its compliance with contemporary government and industry safety standards. Respondent's contentions to the contrary are without merit.[8]

C. As noted in the petition (Pet. 15 n.5), this Court's recent grant of a stay in a case presenting a virtually indistinguishable issue, *Owens-Corning Fiberglas Corp. v. Rek-*

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a governmental body and that the TLV was not adopted in jurisdictions where he worked. He does not deny, however, that the TLV was the generally accepted safety standard in the industry or that the TLV was adopted by law in a number of States. Accordingly, the parallel between this case and *BMW* is exact.

[8]Respondent also errs in contending (Br. in Opp. 5 n.3) that OCF waived its due process challenge to the punitive damage award by failing to request an instruction stating that compliance with industry standards is "'evidence that a product is not defective.'" The question presented in the petition does not involve the type of evidence that will support a finding of product defect. Instead, OCF is challenging the punitive damage award as unconstitutionally excessive, as demonstrated in part by the evidence of OCF's compliance with government and industry safety standards. A jury instruction about the product-defect issue would have been irrelevant to the question raised in the petition, and OCF therefore had no obligation to request one.

dahl, Nos. A-241 and 95-818, pet. for cert. filed (Nov. 22, 1995), demonstrates the propriety of holding this petition pending the Court's disposition of *BMW*. Respondent offers no basis for his contrary conclusion.[9] The fact that the ratio of punitive damages to actual damages in *BMW* is higher than it is in this case is beside the point, because this Court has already indicated that such ratios are not dispositive under the Due Process Clause. *See TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993). Instead, the Court's resolution of the excessiveness issue in *BMW* is likely to turn in large part on its analysis of many of the same factors at issue here, and thus a remand for reconsideration of the judgment below will almost certainly be appropriate if the Court resolves the excessiveness issue in favor of the petitioner in *BMW*.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted, the judgment below summarily reversed, and the case remanded for further proceedings. In the alternative, the petition should either be granted and set for plenary consideration or held and then disposed of in light of this Court's disposition of *BMW of North America, Inc. v. Gore*, No. 94-896.

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[9]Nor does respondent even attempt to refute OCF's showing (Pet. 16-17) that the judgment below conflicts with the Third Circuit's decision in *Dunn v. HOVIC*. The existence of that conflict further demonstrates the certworthiness of this petition.

January 3, 1996

Respectfully submitted,

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